Supreme Court, U.S.
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No. 01-601

In The

Supreme Court of the United States

KENNETH L. LOCHBAUM, Individually, and
KEN LOCHBAUM PHYSICAL THERAPY CLINIC, INC.,

Petitioners,

v.

ST. PAUL INSURANCE COMPANIES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the United States Court of Appeals for the Third Circuit properly rule that the statute of limitations for bad faith actions based upon a Pennsylvania statute, 42 Pa. C.S.A. § 8371, is the two year statute of limitations for tort actions, where neither the Pennsylvania Supreme Court nor the Pennsylvania appellate courts have decided the issue, and lower Pennsylvania courts and Pennsylvania Federal District Courts have reached different conclusions on the issue?

PARTIES TO THE PROCEEDING

Petitioner incorrectly identifies Respondent, United States Fidelity and Guaranty Company ("USF&G"), as having been merged into "St. Paul Insurance Companies." Rather, USF&G was not merged into another entity. Instead, it is a wholly-owned subsidiary of St. Paul Companies, Inc.

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STATEMENT OF THE CASE

Respondent does not fully agree with the Statement of the Case as presented by Petitioner. However, insofar as the matters set forth in Petitioner's Statement of the Case are not germane to a resolution of the issues raised in the Petition, Respondent will not present herein a counter-statement of the case. Respondent, however, reserves the right to challenge the matters set forth in Petitioner's Statement of the Case, should it become necessary in some future proceeding in this matter.

SUMMARY OF THE ARGUMENT

The Petition should be denied because the United States Court of Appeals for the Third Circuit correctly affirmed the decision of the United States District Court for the Western District of Pennsylvania in ruling that Pennsylvania's two year "tort" statute of limitations, set forth at 42 Pa. C.S.A. § 5524, shall apply to insurance bad faith actions under 42 Pa. C.S.A. § 8371. Since there is no Pennsylvania Supreme Court or Pennsylvania appellate court decision on point, and where lower Pennsylvania and Federal District Court decisions are split on the question whether a two year or six year statute of limitations should apply in bad faith cases, and where there is no conflict among the Federal Circuit Courts, the Third Circuit's decision was proper.

ARGUMENT

A. There is no Conflict with Decisions of other Courts of Appeals

There is no compelling reason for a Writ of Certiorari to be granted in this case. The question in the present matter involves an issue of Pennsylvania law. Petitioners have cited no other U.S. Court of Appeals which has entered a decision in conflict with the decision of the United States Court of Appeals for the Third Circuit on the issue presented in this case. For this reason alone the Petition should be denied.

B. The Third Circuit Indirectly Considered Lower Pennsylvania Court Precedent

The question involved in the present case – whether the statute of limitations for a bad faith action under 42 Pa. C.S.A. § 8371 is two years or six years – has not been decided by the Pennsylvania Supreme Court or any intermediate Pennsylvania appellate court. In a diversity action, where the state's highest court has not decided a particular issue, the federal courts must predict how the state's highest court would decide the issue. *See Packard v. Provident National Bank*, 994 F.2d 1039, 1046 (3d Cir. 1993). In making its prediction, a federal court "must consider relevant state precedents, analogous decisions, considered dicta, scholarly works, and any other reliable data tending convincingly to show how the highest court in the state would decide the issue at hand." *See McKenna v. Ortho Pharmaceutical Corp.*, 622 F.2d 657, 663 (3d Cir. 1980).

The instant statute of limitations question has only been decided by Pennsylvania Courts of Common Pleas and Pennsylvania federal district courts. Thus, the District Court and the Third Circuit were required to predict how the Pennsylvania Supreme Court would decide the period of limitations for a bad faith action under 42 Pa. C.S.A. § 8371.

The Petitioners argue that a Writ of Certiorari should be granted because the decision in the present case allegedly gave little or no weight to Pennsylvania Common Pleas Court decisions determining the statute of limitations period for a bad faith action under 42 Pa. C.S.A. § 8371. While it is not immediately apparent that the Third Circuit looked directly at Pennsylvania lower court precedent, it must have done so because the District Court's opinion it affirmed expressly cited to the decisions of lower Pennsylvania Courts and, undoubtedly, the Third Circuit independently reviewed the principal cases relied upon by the District Court. Also, the Third Circuit's reliance upon *Nelson v. State Farm Mutual Automobile Insurance Co.*, 988 F. Supp. 527 (E.D.Pa. 1997) would suggest that it gave due consideration to lower court precedent, since the *Nelson* court cited a number of lower court decisions in reaching its result.

Indeed, the District Court in this matter expressly acknowledged that "[t]he Pennsylvania State Courts that have addressed the applicable statute of limitations for Section 8371 claims have reached conflicting conclusions," and cites to some of those decisions (Pet. at 13a). Moreover, the District Court observed that "the federal courts in Pennsylvania that have faced the issue have divided between the two and six-year possibilities" and

cites to those cases as well (*Id.*). Thus, it must be presumed that the Third Circuit considered the lower court cases set forth not only in the very District Court decision it affirmed, but also the District Court decision it principally relied upon.

C. Even if Lower Court Precedent was not Considered, the Third Circuit's Prediction is Still Valid

Even if the Third Circuit failed to consider lower Pennsylvania Court precedent, neither lower state court decisions nor decisions of other federal courts are controlling where the highest state court has not decided an issue. *McKenna*, at 662. Moreover, consideration of lower Pennsylvania Court decisions and federal district court decisions does not compel the adoption of the six year limitation period advocated by Petitioners. Indeed, as noted *supra*, both the Pennsylvania Courts of Common Pleas and the Pennsylvania federal district courts have decided the instant statute of limitations issue inconsistently. *See, e.g., Susich v. Prudential Property & Casualty Insurance Co.*, 35 Pa. D.&C. 4th 178 (C.C.P. Beaver Co. 1998) (holding bad faith actions are governed by a two-year statute of limitations); *Hospital Shared Services v. CIGNA Ins. Co.*, 41 Pa. D.&C. 4th 148 (C.C.P. Allegheny Co., 1998) (holding bad faith actions are subject to a six year statute of limitations); *Nelson v. State Farm Mutual Automobile Insurance Co.*, 988 F. Supp. 527 (E.D.Pa. 1997) (holding bad faith actions are subject to a two year statute of limitations); and *Woody v. State Farm Fire and Casualty Co.*, 965 F. Supp. 691 (E.D.Pa. 1997) (holding bad faith actions are subject to a six year statute of limitations).

Therefore, contrary to Petitioner's suggestion that adherence to lower state court precedent should have compelled a finding that the six-year limitations period applies, there is no such unanimity among lower Pennsylvania courts.

D. The Third Circuit Accurately Predicted how the Pennsylvania Supreme Court would have Ruled

Petitioners argue that the decisions of the District Court and Third Circuit in this matter discount the Pennsylvania Superior Court's finding in *Gabriel v. O'Hara*, 368 Pa. Super. 383, 534 A.2d 488 (1987). Preliminarily, Petitioners' challenge to the decision of the District Court does not appear to be an appropriate matter for inclusion in a Petition to this Court. Rather, the only question here is whether the United States Court of Appeals for the Third Circuit ruled correctly.

To the extent, however, that any discussion of the District Court's ruling is appropriate, it must be noted that the opinion it allegedly discounted, *Gabriel*, dealt with the limitations period under the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 Pa. C.S.A. § 201-2. *Gabriel* did *not* deal with the statute at issue in the instant case, 42 Pa. C.S.A. § 8371. Rather, it dealt with a completely separate Pennsylvania statute. An analogous decision of an intermediate appellate court is not necessarily controlling. *See McKenna*, 622 F.2d at 662, citing *Commissioner v. Estate of Bosch*, 387 U.S. 456, 471, 87 S.Ct. 1776, 1785, 18 L.Ed.2d 886 (1951). The *McKenna* Court stated that "relevant state precedents must be scrutinized with an eye toward the broad policies

that informed those adjudications, and to doctrinal trends which they evince." *McKenna*, at 662, citing *Becker v. Interstate Properties*, 569 F.2d 1203, 1206 (3d Cir. 1977).

The District Court did precisely what the *McKenna* court suggests. Among other things, it reviewed the history of bad faith claims in Pennsylvania and the definition of bad faith adopted by the Pennsylvania Superior Court in *Romano v. Nationwide Mut. Fire Ins. Co.*, 646 A.2d 1228, 1232 (Pa. Super. Ct. 1994). It also discussed Judge Brody's analysis in *Woody, supra*, a case which followed the purportedly analogous *Gabriel* decision. Following this analysis, the District Court declined to follow the reasoning of *Woody* and *Gabriel*, and instead followed the rationale set forth in *Nelson*. Of course, the Third Circuit also relied upon *Nelson* in upholding the two year limitation adopted in the District Court. Thus, both the District Court and the Third Circuit, per the guidelines set forth in *McKenna, supra,* considered and scrutinized relevant state precedents, any analogous decisions, and other information relative to the nature of bad faith claims and reasoned that an insurer's duty to act in good faith with its insured is a duty that is derived from tort law. Accordingly, both Courts made their decisions in conformity with accepted legal principles.

CONCLUSION

For the foregoing reasons the Petition should be denied.

Respectfully submitted,

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